THE 1999 CONSTITUTION AND THE ALLOCATION OF TAXING POWERS: WHERE LIES THE PRINCIPLE OF FISCAL FEDERALISM?

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Abstract

The paper examines the division of taxing powers under the Constitution of the Federal Republic of Nigeria, 1999 as amended. The paper observes that the constitution concentrates the taxing powers only on the central government. Part I of the Second Schedule contains 68 items with the heading 'exclusive legislative list' which only the federal government can legislate upon to the exclusion of the states and which contains virtually all the taxing powers while the concurrent list in Part II of the Second Schedule which both the states and the federal governments can legislate upon does not contain a single taxing power. For this reason, the states rely on only resources from the federal government for survival. The paper further examines the Taxes and Levies (Approved List for Collection) Act 1997 and the Federal Inland Revenue Establishment Act which further compounded the issue by centralizing the tax system in Nigeria. The paper finally examines the concept of federalism. One of the features of a true federalism is the independence of the component units including fiscal independence. The paper concludes that fiscal independence of the component units is necessary and this can only be achieved if the states are allowed to legislate, to the exclusion of the central government on some tax laws like the Value added Tax.

Keywords: Constitution, Fiscal Federalism, Residual List, Taxing powers.

1. Introduction

Prior to the discovery of crude oil and other revenue generating natural resources in Nigeria, taxation was the major source of revenue for governments in Nigeria. However, upon the production and exportation of crude oil, taxation was abandoned and attention was shifted to the revenue generated from the sale of crude oil to the extent that the economy and the yearly budget was based entirely on the amount that may likely be generated from the sale of crude oil. However, recently, attention has been gradually shifted back from crude oil to taxes. While the federal government generates billions of Naira in taxes on a daily basis, the states in Nigeria,[1] are impoverished as they still depend on the federal government for monthly allocation.

The issue of finance and fiscal relations between the higher tiers of government in Nigeria and the lower tier has become a principal setback to true transformation and real economic development in the country.[2] It has been observed that the Nigerian system of revenue sharing, in which sub – federal authorities obtain some 80 percent of their budget from mandated central transfers, violates a cardinal condition of fiscal efficiency, namely that the government that enjoys the pleasure of spending money must first experience the pain of extracting the money from the tax payers.[3]

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[1] With the exception of Lagos State.

[2] NA Ejikeme, (2012 Fiscal Federalism and Local Government Finance in Nigeria World Journal of Education vol.2, No 5 pp 19 – 27

[3] TS Rotimi, (2005) Reinventing the Architecture of Nigerian Federalism, The Brown Journal of World Affairs, vol. 12, No 1 pp 139 – 154.

1.1 The Exclusive Legislative List

The 1999 Constitution[4] divides the taxing powers between the federal and state governments. The Constitution contained sixty – eight Items (68) items with the title "Exclusive Legislative List" (ELL).[5] The items are exclusively reserved for the federal government and only the National Assembly can legislate on them. All the major income generating items like mines and minerals, including oil fields, oil mining, geological surveys and natural gas,[6] custom and excise duties,[7] export duties,[8] taxation of profits, income and capital gains[9] are on the ELL. The accruable revenue from exploration and production of crude oil accounts for 80% of government revenue and yet, the ELL still concentrates most of the taxing powers in the federal government with little or nothing for the federating units to legislate upon. Although, the ELL contains 68 items, only four (4) items were expressly referred to as taxes. This may give an erroneous impression that the federal government can only impose taxes on those four areas.[10] However, the federal government is generating revenue constantly from other items in the ELL though not as taxes but in form of charges, fees or levies to the exclusion of the state governments.[11]

The legislative power contained in the ELL which is vested in the National Assembly[12] is derived from section 4 (2) of the Constitution which provides as follows:

> The National Assembly shall have power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the Legislative list set out in Part 1 of the Second Schedule to this Constitution.

The Constitution further provides that the power of the National Assembly to make laws for the peace, order and good government of the Federation shall with respect to any matter included in the Exclusive Legislative List shall save as otherwise provided in this constitution, be to the exclusion of the Houses of Assembly of States.[13]

1.2 The Concurrent Legislative list

The Constitution also contains the Concurrent List which both the Federal and the State governments have the power to legislate upon.[14] The Concurrent Legislative List (CLL) contains 30 items. It is however unfortunate that none of the items in the concurrent list is a revenue generating item. In other words, no taxing power is expressly reserved for the state governments

[4] Constitution of the Federal Republic of Nigeria (Promulgation) Act No 24. 1999 (as amended) which shall be referred to as the 1999 Constitution in this paper.
[5] Second Schedule, Part 1 of the 1999 Constitution.
[6] Item 39
[7] Item 16
[8] Item 25
[9] Item 59
[10] Sanni A. O., (2003) Division of Taxing Powers under the 1999 Constitution, No 3 vol 5 (Modus international Law and Business Quarterly) pp 103 – 109.
[11] For example, passports and visas, registration of companies, Railways etc.
[12] Section 4(1) of the 1999 Constitution
[13] Section 4(3) of the 1999 Constitution
[14] second schedule, Part 11 of the 1999 Constitution

in the 1999 Constitution.[15] This accounts for the State governments' almost exclusive dependence on the Federal governments for survival.

The taxing power of the states in Nigeria is open ended. States can impose and collect taxes from people within their respective jurisdiction. However, section 4 (5) further puts a check on the power of the House of Assembly to make laws when it provides that if any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail and that other law shall to the extent of its inconsistency, be void.[16] In other words, for a state tax law to be valid, there must be no federal law which has covered the field sought to be covered by the state law and in addition, the law must not be inconsistent with the tax law made by the National Assembly.

The case of *Attorney General of Ogun State v. Alhaja Aberuagba*[17] is a good example to interpret the above provision of the constitution. The facts of the case is that the Ogun State House of Assembly enacted the *Sales Tax Law* which seek to charge taxes on all taxable products brought into the state and on supply of goods and services not exempted from the requirement of registration under the law. The Plaintiffs who were the respondents at the Supreme Court brought an action against the defendant seeking a declaration that the *Sales Tax Law of Ogun State 1982* is inconsistent with the provision of the Constitution of the Federal Republic of Nigeria and accordingly void. The Supreme Court held by the majority decision that:

> It is axiomatic that in the absence of any constitutional provisions, express or implied, to the contrary the respective taxing powers of the Federation and of a State includes sales taxing power. Accordingly, the Federation is entitled to levy sale tax on any saleable matters within its competence. It must however be emphasized that it is not within the competence of a State:
> (a) To make sale tax law affecting matters in the Exclusive Legislative List; or
> (b) To make any sale tax law in the concurrent legislative list which is inconsistent with any law validly made by Federation; or
> (c) To make any sales tax law in the concurrent legislative list on any matter in the concurrent legislative list where any law validly made by the Federation has covered the field.[18]

2. The Doctrine of Covering the Field

The fact that there is an existing law made by the National Assembly should not necessarily mean that the state law on the same subject matter will be null and void. Even in the case of *Attorney General of Ogun State v. Alhaja Aberuagba*,[19] the Supreme court rejected the argument of the respondent that the state tax law is void on the ground that it is inconsistent with item 61 of the ELL under the 1979 constitution. The court held that both the federal and state governments had the powers to impose sales tax on any saleable matters within their respective legislative competence. Similarly, in the case of *Attorney General of Federation v. Attorney General of Lagos State*[20] where the federal government filed a suit challenging the constitutionality of the

[15] Sanni op cit
[16] Ibid Section 4(5)
[17] [1985] 1 NWLR (Part 3) SC 395
[18] Per Bello JSC p. 413 para D - F
[19] Supra
[20](2003) 12 NWLR (Pt 833) 6 S.c (Pt.1)24

Lagos State Hotel Licensing Law,[21]the Hotel Licensing (Amendment Law),[22] and the Hotel Occupancy and Restaurant Law[23] on the ground that section 4(2d) of the Nigerian Tourism Development Act 2004 and item 60(d) of the ELL in the 1999 constitution have already covered the field, the Supreme court held that:

> ...The National Assembly cannot, in the exercise of its power to enact some specific laws, take the liberty to confer power or authority on the Federal Government or any of its agencies to engage in matters which ordinarily ought to be the responsibility of a State government or its agencies…[24]

The doctrine of covering the field is recognized in American and Australian Constitutional law and it is relevant and important in a federal structure which adopts a concurrent legislative list in its scheme of power sharing between or among the tiers of government.[25] In *INEC v. Musa*[26] Tobi JSC stated that:

> In my humble opinion, a state law which is not necessarily inconsistent with either the Constitution or an Act of the National Assembly but merely covers the legislation field of the National Assembly is not that harmful as it is merely a surplusage ...

Most states in Nigeria do not generate revenue through taxation as they have the erroneous impression that they cannot legislate further on taxes as the federal laws have covered the field. The state only needs to ensure that there is no federal law on the subject matter so that the issue of double taxation will not arise. The crux of this submission is that the states have the power to legislate on all matters in the concurrent legislative list notwithstanding any federal law on the same subject matter except where such law is in conflict with the federal law. In *A.G. Ondo v. A.G. Federation*,[27] it was observed that:

> Federalism accommodates a certain amount of inequality of power and financial resources between the national and regional governments, so long as any preponderance in favour of one is not such as to reduce the other to virtual impotence. In as much as the Federal Legislation takes precedence over the state legislation, this does not preclude or take away the power of the state to make similar legislation on the same matter to which it has legislative competence.

However, it appears that the Supreme has overruled the decision in *A.G of Ondo v. A.G of Federation* in a more recent decision of *A.G of Lagos v. Eko Hotel & Anor*.[28] In this case, the Lagos State Internal Revenue Service (LIRS) demanded from Eko Hotels Limited remittance of money due as tax on sales to its customers. Prior to this time, Eko Hotels used to remit VAT to the Federal Board of Inland Revenue (FBIR). However, the LIRS insisted that Eko Hotels was not exempted from collecting and remitting taxes under the Sales Tax Law. On the 5th March

[21] Cap H6 Laws 2003
[22] No. 23 Vol. 43 , 2010
[23] No 30 Vol. 42 2009
[24] Attorney General of Federation v. Attorney General of Lagos State (supra)
[25]Charles llegbune, "The Nigerian Constitution, 1999 and the Law maker in Justice in the Judicial process": "Essays in honour of Hon. Justice Eugene Ubaezonu JCA)" Cc Nweze (ed.) 2002, at p.308
[26] (2003) FWLR (pt 145) 729 @ 812.
[27] 2002 9 NWLR (Pt.772)@ p. 222
[28] (2017) 12 SC (Part 1) 107

2004, Eko Hotels filed a suit against both the Attorney General of Lagos State and the FBIR and asked the Federal High Court (FHC) to determine which body it ought to remit the tax collected to as Eko Hotels took the view that it would be inappropriate for it to remit the tax to both FBIR and LIRS.

On the substance of the suit, the FHC held that the VAT Act as a federal enactment had covered the field (i.e legislated on the subject matter) which the Sales Tax Law sought to legislate on. Consequently, Eko Hotels was obligated as a taxable person to remit the tax deducted on sales to its customers to only one agency, namely the FBIR. Dissatisfied with the decision, the Lagos Stat Government appealed to the Court of Appeal which dismissed the appeal and upheld the decision of the FHC. The Lagos State Government further appealed to the Supreme Court. The Supreme Court held that the doctrine of covering the field would apply because the VAT Act is an existing law which had covered the field of the Sales Tax Law and that it would amount to double taxation to impose VAT and sales tax on one consumer for the same goods and service. Furthermore, the Supreme Court found that because the rates of VAT and sales tax are similar, it follows that there is unhealthy competition between the two laws, thus throwing the consumer and collection agents into confusion. The Court decided that in the circumstance, the Sales Tax Law would remain inoperative until such a time when the VAT Act is either repealed by the National Assembly or invalidated by a court of competent jurisdiction.

The Supreme Court in this case did not take into consideration the fact that the VAT Act is neither in the ELL nor in the CLL and therefore should have been residual to the states by virtue of Section 4 (7) of the Constitution. The Court also did not consider its earlier decision in *AGF v AG Lagos State,*[29] where it held that the doctrine of covering the field does not apply to residual matters as those are matters within the exclusive legislative competence of the State Assembly.

3. The Taxing Power of the Local Governments

The role of the Local Government in rural development cannot be over emphasized. Nonetheless it often appears that Nigeria is a partnership between the states and the federal governments only.[30] This is because the Local Government is a creation of the states[31] and in addition the Constitution provides that Nigeria shall be a Federation consisting of States and a Federal Capital Territory.[32] This argument tilts towards the reasoning that there are only two tiers of government - federal and the states. For this reason, some states took over completely the functions of the local government and treat the local government as an extension arm of the states.

The function of Local government is stated in the fourth schedule to the Constitution. These among others include tenement rates, licensing of motorcycle, radio, motor park naming of roads and streets and numbering of houses, provision and maintenance of public conveniences, sewage and refuse disposal, registration of all births, deaths and marriages etc. Most local governments in Nigeria have erroneous impression that they have an unfettered power to exercise the functions listed in the fourth schedule of the 1999 Constitution. However, going by the provision of section 7(5), and item 1 (j) and 2(d) of the fourth Schedule to the Constitution, the functions of local governments enumerated in the fourth schedule to the constitution can only be exercised by

[29] [1985] 1 NWLR (Part 3) P. 395
[30] 2002 9 NWLR (Pt.772)@ p. 222
[31] Section 8 of the 1999 Constitution
[32] Section 2(2) of the 1999 Constitution

a law of the State House of Assembly. This sort of power structure makes the local government in Nigeria subservient to the state governments. More so, the items listed in the fourth schedule as the functions of Local government are also matters that are residual to the states by virtue of section 4(7) of the Constitution. The implication of this is that the local governments cannot impose tax on any subject matter whatsoever.[33]

4. The Taxies and Levies Approved List for Collection Act 1998

The *Taxies and Levies* (*Approved List for Collection*) *Act of 1998*[34] in its schedule, lists the taxing power of the federal, state and local governments.[35] Section 1(2) of the Act vested the minister of finance with legislative powers ordinarily reserved for national assembly when it provides that the minister of finance may, on the advice of the Joint Tax Board and by Order published in the Gazette, amend the Schedule to the Decree.

Part 1 of the schedule contains Taxes and levies to be collected by the Federal Government while Part 2 contains taxes and levies reserved for the State government. However, the Act gave an erroneous impression that the taxes listed in Part 2 are within the legislative competence of the state. The major taxes reserved in the Act are: Personal Income Tax in respect of Pay as You Earn (PAYE), Direct Taxation (Self Assessment), Withholding Tax, Capital Gains Tax and Stamp Duties on instruments executed by individuals. These are federal laws and the states are only acting as collection agents on behalf of the federal government by virtue of Item D7 of part 11 of the second Schedule of the Constitution and by virtue of section 162 of the Constitution also, the revenue generated from these taxes are to be paid into the Revenue Consolidated Account and the net proceed of the taxes will be distributed among the states on the basis of derivation.[36] Furthermore, where the tax above is collected by the government of a state, it will only be treated as part of the consolidated revenue for that state.[37] From the above provisions, it is clear that the state does not have absolute control and authority over the taxes listed in the Act and that said taxes were erroneously tagged as taxes to be collected by the state governments.

5. The Scheme for Sharing of Federal Tax Proceeds

The Value Added Tax Act[38] Personal Income Tax Act[39], Stamp Duties Act[40] and the Capital Gains Tax Act[41] are federal laws enacted by the National Assembly. The Value Added Tax was introduced in January 1994 to replace the unsuccessful state based sales tax, and in the year 1994 alone, the whopping sum of 8.6 billion Naira was generated from VAT.[42] The VAT is a tax payable on the supply of all goods and services referred to by the Act as taxable goods and services.[43] The Value Added Tax is neither in the ELL nor in the CLL and should therefore be a matter residual only to the states. The tax is computed at the rate of 5 percent on the value of all

[33] Sanni op cit
[34] Formerly Decree *No. 21 of 1998*
[35] Nduka I., (2011- 2012) How Much Force is Still Left in the Taxes and Levies (Approved List for Collection) Act Nigerian Juridical Review 1vol 10 @ pp 1
[36] Section 163
[37] Section 163(a)
[38] Cap V1 LFN 2004, formerly Decree No 102 of 1993
[39] Cap P8 Laws of the Federation of Nigeria 2004
[40] Cap S4 LFN2004
[41] Cap C2 LFN 2004
[42] Emmanuel O.O The Politics of Revenue Allocation and Resources Control in Nigeria: Implications for Federal Stability., Federal Governance, vol. 7 no 1. p. 15 – 38.
[43] See section 2 of the Value Added Tax Act

goods and services.[44] The Federal Inland Revenue Service (FIRS) is vested with the administration of the tax.

Nigeria operates a fiscal system whereby all the revenue of the federal government is pooled together in the Federation Account and distributed among the three arms of government based on a formula that is exclusively determined by the National Assembly.[45] Section 162 (1) of the 1999 Constitution provides as follows:

> The Federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the Armed Forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja[46]

For example, the FIRS is responsible for the collection of VAT in all the 36 states including the Federal Capital Territory. From the above constitutional provisions, the revenue generated must be paid into the Federation Account, an account controlled solely by the federal government. The VAT Act provides in section 40 as follows:

> Notwithstanding any formula that may be prescribed by any other law, the revenue accruing by virtue of the operation of this Act shall be distributed thus:
>
> (a) 15% to the Federal Government
>
> (b) 50% to the State Governments
>
> (c) 35% to the Local Governments
>
> Provided that the principle of derivation of not less than 20% shall be reflected in the distribution of the allocation amongst States and Local Governments as specified in paragraph (b) and (c) of this section[47]

It connotes from the above provision that the states will then wait monthly for their shares of the VAT proceeds. Presently, as noted by Sanni,[48] 'In political parlance, the inter governmental fiscal arrangement in Nigeria is said to emphasize on how to share the national cake rather than how to bake it.'[49]

For instance, in 2017, the FIRS generated 204.077 billion Naira as VAT in the first quarter of 2017[50] and 974 billion Naira at the end of the year. Yet, VAT is only one out of the numerous federal taxes. Bearing in mind that proceeds from crude oil account for 80 % of the revenue of the federal government, the proceed from the VAT in the federation account is just like a cup of water from an ocean to the federal government. Therefore the much desired fiscal independence for the federating units in Nigeria would have been achieved if states are allowed to collect the Value Added Tax.

[44] Section 4
[45] Sanni A.O., (supra)
[46] Section 162 (1) 1999 Constitution.
[47] Section 40
[48] Sanni A.O. op cit
[49] Ibid
[50] The Punch Newspaper Nigeria generates N204.77 billion from Vat in 2017 first quarter, September 5 2017.

The table below shows the disbursement of VAT every January from 2014-2018

State	2014 ₦	2015 ₦	2016 ₦	2017 ₦	2018 ₦
Abia	646,575,070.62	721,369,075.10	616,612,292.28	792,485,969.38	827,863,856.27
Adamawa	658,182,922.77	752,173,987.88	642,131,718.83	823,062,868.48	873,348,450.39
Akwa Ibom	700,567,922.19	790,949,781.32	704,311,481.79	885,111,221.24	914,806,137.51
Anambra	760,967,263.54	835,267,957.61	711,515,439.62	894,127,442.12	952,021,445.21
Bauchi	764,755,068.12	870,539,380.37	744,926,105.02	919,558,937.76	980,104,903.80
Bayelsa	622,632,338.36	634,501,562.96	529,337,716.08	689,445,003.85	730,917,084.48
Benue	740,316,023.64	820,422,077.29	698,065,025.96	893,819,981.94	940,404,733.72
Borno	733,256,864.23	812,876,176.37	684,630,573.69	878,187,498.88	925,961,035.00
Cross Rivers	669,961,723.51	747,238,302.02	606,787,266.95	809,435,090.02	817,331,845.23
Delta	763,971,477.05	848,697,046.32	772,783,244.23	930,857,266.96	968,661,950.67
Eboyi	600,253,142.43	680,868,583.69	567,923,287.18	733,946,514.54	779,499,166.75
Edo	669,585,256.81	779,672,453.61	677,389,063.92	876,363,116.91	904,797,682.20
Ekiti	598,298,988.29	673,523,574.83	571,996,090.05	735,176,018.03	780,612,659.12
Enugu	677,118,447.94	769,445,387.98	657,509,873.06	860,927,827.17	869,720,814.97
Gombe	591,434,324.99	684,560,849.47	568,298,312.07	736,934,286.98	767,998,764.25
Imo	707,220,226.61	802,897,868.37	686,990,705.35	883,374,459.70	922,714,121.77
Jigawa	787,788,283.71	856,115,241.69	714,189,228.14	943,625,268.04	1,003,199,684.41
Kaduna	886,537,845.81	1,006,161,304.26	847,421,339.59	1,141,179,474.00	1,193,502,460.30
Kano	1,164,768,660.65	1,355,295,753.47	1,122,043,841.67	1,816,159,821.24	1,495,853,602.09
Kastina	856,843,783.01	962,683,596.42	811,612,300.94	1,034,577,921.91	1,068,918,629.96
Kebbi	692,851,033.32	768,646,487.92	627,514,580.05	810,022,582.52	847,292,441.82
Kogi	665,003,609.56	755,177,010.74	645,251,395.94	821,885,152.85	867,451,629.51
Kwara	405,746,523.09	699,647,159.86	584,263,869.06	741,053,380.88	785,738,397.77
Lagos	6,038,857,545.46	6,981,885,905.11	5,785,458,132.05	6,558,998,376.61	7,772,176,070.75
Nassarawa	569,123,241.61	662,949,754.30	541,613,074.61	725,751,466.02	753,501,354.35
Niger	716,597,661.89	819,982,248.14	685,520,855.34	894,433,194.78	954,897,858.31
Ogun	707,895,298.71	809,568,678.06	677,508,546.37	872,380,605.11	961,565,028.88
Ondo	675,520,016.85	766,307,939.91	652,012,761.45	826,565,066.27	881,185,750.16
Osun	696,999,624.32	763,355,357.49	646,483,029.55	824,703,833.23	865,256,356.09
Oyo	870,715,077.49	952,021,961.13	914,397,592.80	1,259,673,109.95	1,265,749,200.28
Plateau	672,798,208.33	803,583,260.24	649,233,229.31	865,068,948.37	874,772,183.57
Rivers	970,387,056.37	1,169,926,250.94	1,006,396,206.40	1,432,927,322.68	1,463,795,853.98
Sokoto	723,903,260.60	793,591,954.18	659,577,417.49	845,548,813.93	887,913,451.61
Taraba	603,344,080.45	695,059,582.56	593,081,177.24	746,972,750.79	772,062,843.88
Yobe	599,921,134.82	674,496,843.48	564,479,546.33	749,473,354.14	781,750,475.99
Zamfara	657,525,843.51	742,126,367.72	624,952,851.91	797,544,431.04	849,307,279.43
Total VAT	**30,868,224,850.63**	**35,263,586,722.81**	**29,794,219,172.32**	**38,051,358,378.30**	**40,302,655,204.48**

Source: *Hard copy of this material was obtained directly from the Office of the Accountant-General of the Federation*

From the above, the total VAT distributed to States is **N40,302,655,204.48** and this represents only 50% of the total VAT generated in the month of January, 2018. This amount was generated from the formal sector only as it is extremely difficult for the FIRS to collect VAT from the informal sector for so many reasons. The sheer size of the informal sector makes it practically difficult to ascertain the actual membership and activities of the sector. This amount could be doubled if only the states which are closer to the informal sector are allowed to collect this tax.

The informal sector has emerged to absorb the shortfalls of the formal sector, providing employment and means of livelihood for the semi-skilled and unskilled alike. A recent study by Chatham House Royal Institute of International Affairs indicated that the Nigerian informal sector constitutes as much as 64% of Gross Domestic Product (GDP).[51] Most states in Nigeria have no difficulties in collecting market levies, tenement rates etc from the informal sector which are taxes exclusively within the purview of the states. The revenue generated from these taxes and levies comes in piece-meal and this connotes that they will not have much challenges in bringing the sector into the tax net of the Value Added Tax.

6. Federal Inland Revenue Service (Establishment) Act and the Unification of Taxes

As discussed above, the division of taxing power under the 1999 Constitution does not reflect true fiscal federalism and the Federal Inland Revenue Service (Establishment) Act 2007 (FIRSA) created more problems. The Act effectively put Nigeria in a position of 'unitary federalism' as it whittled down the existing powers of the States under the 1999 Constitution. Section 2 of the Act provides as follows:

> The object of the Service shall be to control and administer the different taxes and laws specified in the first schedule or other laws made or to be made from time to time by the National Assembly or other regulations made there under by the Government of the federation and to account for all taxes collected.

By this provision, the Act effectively put under the control of the FIRS, all tax laws including tax laws that will be enacted in future by the National Assembly. The legislations listed in the First Schedule are:

1. Companies Income Tax Act
2. Petroleum Profit Tax Act
3. Personal Income Tax Act
4. Capital Gains Tax Act
5. Value Added Tax Act
6. Stamp Duty Act
7. Taxes & Levies (Approved List for Collection) Act, 1998.

Although, the Acts listed above are Acts of the National Assembly and it is within the exclusive jurisdiction of the National Assembly to impose taxes in the areas covered by the Acts, however the wordings of section 2 above creates an impression that the collection of taxes in all the Acts listed above reside only in the Service. The Act further provides that the Service shall have power to administer all the enactments listed in the First Schedule to this Act and any other enactments or law on taxation in respect of which the National Assembly may confer power on the Service.[52]

The Act takes precedence over every other federal or state law on taxation. Section 68 of the Act provide as follows:

[51] Henshaw G. The Informal Sector and Taxation in Nigeria (The Barcode) A Newsletter by Still Water Law Firm, Vol 2.
[52] Section 25

> (1) Notwithstanding the provision of this Act, the relevant provisions of all existing enactments including but not limited to, the laws in the First Schedule shall be read with such modifications as to bring them into conformity with the provision of this Act.
>
> (2) If the provisions of any other law including the enactments in the First schedule are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other law shall to the extent of its inconsistencies be void.

The implication of the provisions of sections 2, 25 and 68 is that the laws listed in the First Schedule are now under the administration of FIRS. The reason for this is not farfetched: the Acts listed in the 2nd schedule of the Act are Acts of the National Assembly. This is despite the fact that Item D7 of Part 11 of the second Schedule of the Constitution provides as follows:

> "In the exercise of its powers to impose any tax or duty on - (a) capital gains, incomes or profits or persons other than companies; and (b) documents or transactions by way of stamp duties, the National Assembly may, subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State."

The word used in the above provision is *'may'* and not '*shall.'* It has been decided in a plethora of cases[53] that the word *'may*' is discretionary while the word *'shall*' is mandatory. Therefore the power of the states to collect federal taxes as stated in Item D7 above is at the discretion of the National Assembly. Can we now say that the National Assembly withdrew the power delegated to the states to collect some of the federal taxes when it enacted the FIRSA and put all the implementation of all federal tax laws under the firm control of the Service?

The FIRSA does not recognize the State Board of Inland Revenue (SBIR) as contained in the Personal Income Tax Act. All the functions of the SBIR as contained in section 88 of Personal Income Tax Act were listed as the functions of the FIRS. The only reference to the SBIR in FIRSA is section 8q which provides that "The Service shall issue taxpayer identification number to every taxable person in Nigeria in collaboration with States Boards of Internal Revenue and Local Governments" The draftsmen of the Act did not put into consideration the existence of States Board of Internal revenue (SBIR),[54] it rendered the SBIR redundant. As it is, one can conclude that the SBIR is a book-keeping office to the FIRS going by the provision of section 8q of the Act.

A combination of the provisions of section 4 (7), item D7 of part 11 of the second Schedule of the Constitution and section 88 of Personal Income Tax Act suggest that collection and Administration of the taxes mentioned in the concurrent list are not residual to the State unless the Personal Income Tax Act is amended or repealed. If the Act remains at it is, it will not be a surprise if the Head of the FIRS should order that all revenue received from the operations of the legislations contained in the First Schedule of the Act be paid into the Federation Account in line

[53] For example, *Associated Discount House Ltd v Amalgamated Trustees Ltd (2006) 10 NWLR (Part 989) 635*

[54] The SBIR was created by section 86 of the Personal Income Tax Act and was saddled with responsibilities which among others include advising the federal government in respect of double taxation.

with Section 162 of the constitution which provides that the Federation shall maintain a special account to be called 'the Federation Account' into which shall be paid all revenues collected by the Government of the Federation.

7. The principle of Fiscal Federalism

Nigeria practices federal system of government[55] and in a federal system of government, revenue power is shared between the federal government and the component units. As noted by Sagay,[56] federalism is:

> An arrangement whereby powers within a multi – national country are shared between a federal government and component units in such a way that each unit, including the central authority exists as a government separately and independently from others, operating directly on persons and properties with its territorial area and with a will of its own apparatus for the conduct of affairs and with an authority in some matters exclusive of others.[57]

Since the transition to democracy, there have been several concerns that Nigeria is practicing a unitary system of government as against true federalism.[58] It has been stated that Nigerian federalism is faced with major problems which seem to have defied all possible solutions, one of which is controversy on how the federally generated revenue will be shared between the central and federating units.[59] The subject of these sharing schemes is the federally collected revenues only as the state and local government revenue are not subject to the national sharing formula.[60] Unlike the United States of America, the federating units in Nigeria are like poor beggars who run to the rich central authority for 'monthly upkeep.' As KC Wheare[61] observed:

> If state authorities, for example, find that the services allotted to them are too expensive for them to perform, and if they call upon the federal authority for grants and subsidies to assist them, they are no longer coordinate with the federal government, but subordinate to it. Financial subordination makes an end to federalism in fact no matter how carefully the legal forms may be preserved. It follows therefore that both state and federal authorities in a federation must be given the power in the constitution for each to have access to and control its own sufficient resources. Each must have a power to tax and to borrow for financing of its own resources[62]

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[55] Section 2(2) of the constitution of the Federal Republic of Nigeria (Promulgation) Act No 24. 1999 (as amended) (which shall be referred to in this work as "the 1999 Constitution).

[56] Sagay I., (2008)"How a True Federal System Should Run" The Nations, Lagos, Vintage Press Limited, May 19th 2008.

[57] Ibid.

[58] Ladipo A., (2005) The Nigerian Federation at Crossroads: The Way Forward (Oxford University Press, Publius, Vol. 35, No 3 p. 383 – 405.

[59] Egbosa E., *The Status of State Governments in Nigeria's Federalism* Oxford Journal Oxford University Press Vol 22 No 3 .

[60] Emmanuel Ojo The Politics of revenue allocation and resource control in Nigeria: Implication for Federal Stability.

[61] KC Wheare, Federal Government, 4th ed. (London: OUP, 1953), p. 10 cited by Sanni A.O., op cit.

[62] Ibid

Financial subordination puts an end to federalism. A good illustration is the experience in 2004 when the Federal Government withheld the payment of statutory allocations from the Federation Account to local governments in states where new local governments were created without their say so.[63]

8. Conclusion and Recommendations

Fiscal federalism involves is the system of revenue allocation to enable all levels of government perform their constitutionally assigned duties efficiently and independently[64] by way of intergovernmental fiscal relations.[65] However, due to the concentration of taxing powers by the 1999 Constitution on the federal government to the disadvantage of the federating units, the ability of the States to be creative around its resources and thereby generate huge revenue has been curtailed. It is therefore imperative that the federal government should relinquish the power of collection of Value Added Tax to the States. Apart from the fact that most of our tax laws are outdated, they also subject States to the mercy of the federal government. The Federal Inland Revenue Service (Establishment) Act has destroyed the power of the State Governments to generate revenue from taxation of profits, stamp duties, income and capital gains. The Act has concentrated tax administration in the hands of the FIRS with nothing left for the SBIR except secretarial duty; to issue Tax Identification Number to tax payers. The Act has completely destroyed the division of taxing powers existing in Nigeria as a Federal system. Fiscal decentralization would stimulate growth and development[66] and the severe tension in Nigeria over the issue of revenue allocation will be a thing of the past once the federating units attain fiscal independence.

The unpleasant reality is that the federating states in Nigeria have become so impoverished and reduced to mere federal administrative outlets, depending on monthly allocation and unable to perform their responsibilities.[67] As a result of the dwindling economy of the country, the federating states have been running to the federal government to ask for bail outs and loans in order to pay salaries of workers and embark on capital projects. The fall in the price of crude oil which is our major source of revenue, the political instability, the serious security risk faced by oil explorers as a result of the activities of the locals under the guise of right to self-determination, the movement of the investors to more competitive countries with less challenges to investment, the lack of revenue by government to development utilize and commercialize its huge gas reserves among other several factors are all justification for a research on other legal means through which Nigeria can diversify in order to generate alternative, renewable and sustainable sources of revenue.

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[63] Ladipo A., op cit.

[64] Arowolo D., (2011) Fiscal Federalism in Nigeria: Theory and Dimension (Afro Asian Journal of Social Sciences, Vol. 2, No 2.2 Quarter II). p 2.

[65] Lucky, O.O., (1995) Fiscal Federalism in Nigeria : A Historical Analysis (Gideon Were Publications, Transafrican Journal of History, Vol 24) p.70 – 83.

[66] Akpan H. E., (2004) Intergovernmental Fiscal Relations : The Nigerian Experience Paper presented at the 10th Year Anniversary of the Financial and Fiscal Commission of South Africa, Capetown International Convention Centre , Capetown , South Africa, 10 – 12 August, 2004.

[67] AdibeEmenyonu& Emmanuel Addeh, 'Good Leadership, True Federalism will Defuse Agitations, say Obaseki, Oshiomole, Sagay' *ThisDay*(Benin, August 5, 2017) http://www.thisdaylive.com/index.php/2017/08/05/good-leadership-true-federalism-will-defuse-agitations-say-obaseki-oshiomole-sagay/.lastaccessed on August 7, 2017.

The paper advocate that taxes, which Nigeria has hitherto neglected due to her oil fortunes, is one of such veritable and alternative means of generating huge revenue for government expenditure. The taxing power of the States under the 1999 Constitution needs to be reviewed. There have also been calls from various sections of the country for a National Conference with the object of inserting into the Constitution, the American fiscal approach to federalism.[68] There is an urgent need to carry out a comprehensive tax reform in the country. Presently, the States are not capable of defining what to tax and worse still, they cannot determine the rate of taxes.[69] States need to engage in strategic and innovation thinking to create State based taxes as a source of revenue generation because as this paper posits, the Concurrent Legislative List should not totally foreclose federating units from enacting independent laws on taxation.

[68] Adeleke S., Taxation, Revenue Allocation and Fiscal federalism in Nigeria: Issues, Challenges and Policy Options (Economics Annals) Volume LVI, No 189/April – June 2011.

[69] Akanle O.: The Power to Tax and Federalism in Nigeria, Legal and Constitution al Perspectives on the Sources of Government Revenues. Published by Centre for Business and Investments Studies 1998.